BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHAWN SWANSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,792
MIDLAND STEEL COMPANY	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION	)	
SELF-INSURER'S FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance fund appealed the February 25, 2000 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant filed this claim alleging an August 16, 1999 accident and resulting back injury. After finding that the appropriate date of accident was October 8, 1999, the Judge awarded claimant temporary total disability and medical benefits.

Respondent and its insurance fund contend Judge Benedict erred. They argue that claimant (1) failed to prove that he sustained personal injury by accident that arose out of and in the course of employment and (2) failed to prove that he provided respondent with timely notice of the accidental injury.

The only issues before the Board on this appeal are:

1. Did claimant injure his back while working for respondent in an accident that arose out of and in the course of employment?

2. Did claimant provide respondent with timely notice of the accidental injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. On August 16, 1999, claimant felt a sharp pain in his left lower back while pulling a welder under beams that were leaning against a sawhorse. At the time of the incident, claimant thought that he had torn, strained, or pulled a muscle. Although claimant had experienced back symptoms before, he had never experienced symptoms like those from the August 1999 incident.

2. Claimant first sought medical treatment on August 31, 1999. Despite ongoing symptoms, claimant continued to work through October 8, 1999.

3. Claimant did not initially report the August 16, 1999 incident to respondent. According to claimant, in early September 1999 Sandra Wolfing, who handles respondent's workers compensation claims, asked him how he hurt his back and he responded that it was from bending over and dragging items at work. Claimant testified:[1]

> Q. (Mr. Dorothy) Now, when you injured your back on August 16, 1999, you didn't report it on that day, did you?
>
> A. (Claimant) No.
>
> Q. You think you may have mentioned something to Sandy Wolfing later on regarding having back pain? Is that right?
>
> A. I had went to the doctor about my back and I had returned with a note that stated back pain. I had -- they had scheduled me to go to a chiropractor.
>
> Q. Who had scheduled you to go to the chiropractor?
>
> A. Med Clinic did basically and Sandy had asked me how my back was doing in passing, and I told her that it was -- it hurt and then she asked me how I did that and I said bending over and draggin' stuff around out there, and then she said that -- I said that I'd had an appointment for a chiropractor, and she had mentioned that Gary and a few other guys see chiropractors and that hopefully that would make my back better and I said, yeah, I hope it does. That was just in passing and that was basically it.

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[1] Preliminary Hearing, February 23, 2000; pp. 12 and 13.

But Ms. Wolfing disagrees with that testimony. She testified that she had several conversations with claimant and he did not relate his back problems to work until December 17, 1999. Claimant admits that he never told Ms. Wolfing or respondent's safety coordinator about the August 16, 1999 incident at any time before December 17, 1999.

4. Ms. Wolfing also testified that in October 1999 she prepared a claim form for short-term disability believing that claimant's back problems were not related to his work. In preparing the claim form, Ms. Wolfing check-marked the box that indicated claimant's injury was not related to work. When claimant signed the form, he check-marked the box indicating that his disability was work-related. But claimant failed to advise Ms. Wolfing of that fact and she submitted the form to the short-term disability insurance carrier without noticing the discrepancy. After the form was submitted, claimant began receiving the short-term disability benefits and was continuing to receive them at the time of the February 2000 preliminary hearing.

5. After the August 16, 1999 incident, claimant sought medical treatment on his own. Claimant did not ask respondent to provide him any medical treatment until December 17, 1999, when he asked Ms. Wolfing to authorize Dr. Hylton.

CONCLUSIONS OF LAW

1. Because claimant failed to provide the respondent with timely notice of the accident or his back injury, the preliminary hearing Order should be reversed.

2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.[2] And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.[3]

3. The Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall

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[2] K.S.A. 1999 Supp. 44-501(a).

[3] K.S.A. 1999 Supp. 44-508(g).

> render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.[4]

4. Under claimant's version of the facts, the very earliest that he would have given notice to respondent was early September 1999. Assuming claimant's version to be true, that notice was not timely as it was beyond the initial 10 days following the incident, excluding weekends. Claimant was not asked why he did not report the August 16, 1999 incident before early September. Therefore, the Board can only speculate as to the reason for the delay. The Appeals Board concludes that claimant has failed to prove that he had just cause to delay providing respondent with notice of the August 16, 1999 accident.

5. Claimant has failed to prove that he injured his back through repetitive mini-traumas or a series of accidents through his last day of work on October 8, 1999. The Application for Hearing that claimant filed with the Division of Workers Compensation on December 22, 1999 alleges an August 16, 1999 accident. Claimant tried the preliminary hearing contending that he had injured his back on that date. Claimant did not allege, or testify to, a series of accidents. Further, no medical opinion was provided that established a date of accident different from August 16, 1999, and claimant did not testify that his symptoms worsened following the August 1999 incident as he was not asked.

Medical records were presented that indicate that claimant had increasing back pain following the August 1999 incident, but those records do not address whether that pain was either a natural consequence of the August 1999 incident or from a continuing series of accidents. Reluctantly, the Appeals Board concludes that the present record fails to establish that claimant injured his back at work from repetitive mini-traumas or a series of accidents through his last day of work on October 8, 1999.

6. Claimant has failed to prove (1) that he provided the respondent with timely notice of the August 1999 accident or (2) that he injured his back working for the respondent through October 8, 1999. Therefore, the request for benefits should be denied.

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[4] K.S.A. 44-520.

7. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[5]

WHEREFORE, the Appeals Board finds that claimant did not prove timely notice and the Board reverses the February 25, 2000 preliminary hearing Order. At this time, claimant's request for benefits is denied.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Patrick E. Henderson, Atchison, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

[5] K.S.A. 1999 Supp. 44-534a(a)(2).